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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1257

GARWIN CORPORATION; S'AGARO, INC., a New York Corporation; S'AGARO, INC., a Florida Corporation; JOSEPH WINKELMAN; MILTON MIRSKY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and LOCAL 57, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Citations To Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	3
Statement Of The Case	3
Reasons For Granting The Writ	8
Conclusion	12

CITATIONS

CASES:

Mount Hope Finishing Co. v. NLRB, 211 F.2d 365 (4th Cir. 1954)	9
NLRB v. Atkins Transfer Co., 226 F.2d 324 (6th Cir. 1955)	9
NLRB v. Deena Prods. Co., 195 F.2d 330 (7th Cir. 1952)	8
NLRB v. E. C. Brown Co., 184 F.2d 829 (2d Cir. 1950)	8
NLRB v. Houston Chronicle Pub. Co., 211 F.2d 848 (5th Cir. 1955)	9
NLRB v. Lassing, 284 F.2d 781 (6th Cir. 1960), *cert. den.*, 366 U.S. 909	9
NLRB v. Neiderman, 334 F.2d 601 (2d Cir. 1965)	9
NLRB v. R. C. Mahon, 269 F.2d 44 (6th Cir. 1959)	9
NLRB v. Rapid Bindery Co., 293 F.2d 170 (2d Cir. 1961)	9
NLRB v. Whitin Machine Works, 204 F.2d 883 (1st Cir. 1953)	8
NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961)	8
Reynolds Pallet & Box Co. v. NLRB, 324 F.2d 883 (6th Cir. 1963)	8
Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965)	8

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Petitioners Garwin Corporation et al. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on January 11, 1967.

CITATIONS TO OPINIONS BELOW

The January 11, 1967 decision of the Court of Appeals is not yet officially reported. The original decision of the National Labor Relations Board reviewed by the Court of Appeals in its January 11, 1967 decision is reported at 153 N.L.R.B. 664 and is reprinted in the Joint Appendix[1] at pp. 315-322.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1967.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an Employer's removal of his plant from one location to another in response to Union tactics involving physical threats against the President of the Employer and what the Court of Appeals termed "apparently illegal Union demands" can be held to constitute interference with employees' rights to self-organization, to join unions and engage in concerted activities and constitutes discrimination by the Employer to discourage employees' union membership in violation of Section 8(a)(1) and (3) of the National Labor Relations Act; and whether, as the Court of Appeals held, the reason for the Employer's "hostility" to the Union is "irrelevant" in determining whether the Employer's removal of the plant violates the above specified sections of the Act.

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[1] Hereinafter referred to as "J.A."

[2] The Court of Appeals decree was entered on April 6, 1967.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* are quoted in the Appendix to this brief.

STATEMENT OF THE CASE

This is a case in which the Board, with the approval of the Court of Appeals, found that petitioners closed their New York city swimsuit manufacturing operation and moved such operation to Miami, Florida for the purpose of depriving their New York employees of rights guaranteed by the Section 7 of the Act and to discourage membership in the Union.

Petitioner Garwin Corporation had been in business in New York City manufacturing various lines of swimsuits since 1954, and petitioner Winkelman was Garwin's president and sole stockholder (J.A. 131-132).

In April of 1961 Winkelman was approached by agents of the Union who stated their intent to organize the Company. In June of 1961 the Union demanded that Winkelman sign a Union contract or be picketed (J.A. 134). The proposed contract contained a clause reciting the Union's majority status and a union security clause requiring Union membership as a condition of employment after the 30th day of employment (J.A. 202). The Union contract was signed by Garwin under the threat of picketing. The Trial Examiner, with the approval of the Board and Court of Appeals, rejected Winkelman's offer of proof to show that the Union did not at that time represent a majority of Garwin's employees. (J.A. 134).

Other proferred evidence, which was also rejected, was that two weeks after Garwin signed the contract, the Union refused to permit employees to work on the basis that the employees had not joined the Union (J.A. 135-136).

In July of 1961, after the signing of the contract, the Union advised Winkelman that Garwin could not do business with a dress contractor called Mr. Mort for the reason alleged by a Union agent that in order to do work for Mr. Mort, Winkelman would have to join the Dress Association whose membership fee was $1,000.00. The Union agent told Winkelman that he (the Union agent) could expedite Garwin's application if Winkelman would pay the Union agent $250.00. When Winkelman declined this attempted extortion, the Union directed a work stoppage at Garwin (J.A. 136-139). No witness for the Union denied this testimony of Winkelman.

By January, 1962 none of the employees had yet joined the Union, and the Union sought to bring pressure to force the employees to join. Ten employees quit Garwin's employment because of their refusal to join the Union (J.A. 143).

In January of 1963 Winkelman asked the Union agent for permission to work overtime for one-half an extra hour in the morning and one-half an extra hour in the afternoon. The Union granted only one-half hour per day and stated that permission had to be obtained for this on a daily basis. This prevented Garwin from obtaining the production it required to fulfill its contractual commitments (J.A. 146).

Prior to March or April of 1963, the fringe benefits for Health, Welfare, Retirement and Supplementary

Unemployment-Severance Benefits, amounting to 7½ per cent of gross payroll, were paid on behalf of Garwin's employees by Modern Junior, Inc., a contractor for whom Garwin was working. In March or April of 1963 the Union informed Winkelman that thereafter Garwin itself would be liable for the 7½ per cent. Winkelman told the Union that compliance with this request would be equivalent to putting Garwin out of business by taking away the only money-making account Garwin had (J.A. 149).

Winkelman went to an official of Modern Juniors in April of 1963 to determine whether the price of the product could be raised to compensate for the 7½ per cent increase in labor costs that Garwin would absorb by complying with the Union demand. Modern Juniors, Inc. advised Garwin to hold the request for a price increase in abeyance until the following season. By the end of June of 1963 Modern Juniors, Inc. informed Garwin that it would not itself continue to absorb the 7½ per cent in fringe benefits in the Union contract (J.A. 149-150). Modern Juniors, Inc. orally informed Winkelman that their contract was cancelled (J.A. 163), and this cancellation was formalized by a letter dated August 8, 1963 (J.A. 254). The letter dates the cancellation as of July 15, 1963.

Toward the middle or end of July, Winkelman had a conference with his accountant and concluded that Garwin was "going to fold" (J.A. 175). Shortly thereafter, in July of 1963, Mr. Winkelman's daughter had received a telephone call which had been placed by Mr. Cerbone, the Union business agent, in which Mr. Cerbone had stated that Mr. Winkelman would be dumped in the river if Mr. Winkelman ever revealed a particular statement that Cerbone had made (J.A.

176). The day following this threatening conversation, Mr. Winkelman called Mr. Cerbone for the Union and advised him that Garwin would have to go out of business (J.A. 177).

Thereafter on August 10 or 15, 1963 Winkelman requested a meeting with the Union to discuss the termination of Garwin. At this meeting Winkelman showed the Union's accountant, Feldman, the cancellation of the Modern Junior's contract and told the Union that "you have put me out of business and now I am unable to keep this factory going" (J.A. 150). The record reflects no Union answer to any of these statements and no request to bargain with respect to this decision.

In the face of the above described Union tactics and the economics of the New York operation, Winkelman sought other business opportunities in his field of experience. Beginning with a trip to Florida in March 1963, Winkelman and an associate, Mirsky, investigated other such opportunities. These efforts culminated in the establishment of S'Agaro, Inc., a Florida corporation, which was incorporated in July, 1963 (J.A. 88).

In the proceedings below the Trial Examiner of the Board found that the petitioners had violated Sections 8(a) (1), (3) and (5) of the Act by their closing of the New York city facility and their establishment of S'Agaro in Florida. The order recommended by the Trial Examiner was the conventional order recommended in such cases, i.e., an order to offer to the Garwin employees reinstatement with back pay in either the New York facility (if operations were resumed there) or in the Miami facility, together with an offer of travel pay and moving expenses for Garwin

employees and their families in the event the petitioners remained in Florida and did not resume the New York facility. Continuing the conventional order, the Trial Examiner recommended that petitioners be ordered to bargain upon request with the Union if they resumed the New York operation and that if they remained in Florida the petitioners should bargain with the Union, if, after compliance with the reinstatement, back pay and traveling expense order, the Union represented a majority of employees at the Florida facility (J.A. 273-315).

The Board affirmed the Trial Examiner's decision on the Section 8(a) (1), (3) and (5) alleged violation, but upon a "re-examination" of its policy the Board broadened the Trial Examiner's recommended order by requiring bargaining at the Florida facility whether or not the Union represented a majority of the Employer's employees at that location (J.A. 315-322).

The Court of Appeals (McGowan, J., concurring in part and dissenting in part) remanded the case to the Board because of its conclusion that the Board's order requiring the Employer to recognize the Union as the exclusive bargaining agent of the petitioners' employees in Miami was "on its face, arbitrary." Judge McGowan would have affirmed and enforced the Board's order.

The Court of Appeals, however, unanimously concluded that petitioners violated Section 8(a) (1), (3) and (5) of the Act by the closing of Garwin in New York and the establishment of S'Agaro in Florida. On this issue the Court noted the "constant friction between the Union and the Company, including appar-

ently illegal Union demands", but concluded, as a matter of law that coercive and threatening tactics employed by a union against a company do not permit the company to remove its operations to escape such tactics, and that "the cause of Winkelman's attitude toward the Union is irrelevant." It is on this issue [3] that the present petitioners seek a writ of certiorari.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals on the single issue raised by petitioners herein constitutes a decision on an important question of federal law which has not been, but should be, settled by this Court.

The previous consideration by this Court [4] and by the Courts of Appeal of the generic problem known as the "runaway shop" has centered around the issue of whether the employer's conduct was motivated by a desire to evade the statutory duty to bargain and to discourage adherence to the Union,[5] or, on the other hand, was motivated by economically valid business

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[3] Petitioners expressly do *not* seek a writ of certiorari on the issue of the legality of the Board's proposed remedy, which the Court of Appeals rejected. In petitioner's view the Court of Appeals disposition of this issue was correct and, in any event, it does not raise an issue warranting the discretionary exercise of this Court's certiorari jurisdiction.

[4] *Cf. Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

[5] See, e.g., *NLRB* v. *Deena Products Co.*, 195 F. 2d 330 (7th Cir. 1952); *NLRB* v. *E. C. Brown Co.*, 184 F. 2d 829 (2nd Cir. 1950); *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883 (1st Cir. 1953); *NLRB* v. *Winchester Electronics, Inc.*, 295 F. 2d 288 (2nd Cir. 1961); *Reynolds Pallet & Box Co.* v. *NLRB*, 324 F. 2d 883 (6th Cir. 1963).

reasons,[6] The present case resists the traditional classification.[7]

The Court of Appeals has found that the Employer's "hostility" to the Union was the motivating force in the decision to close the Garwin operation in New York and open the S'Agaro operation in Miami. To end the inquiry at this point, as the Court of Appeals would do by its ruling that the cause of the Employer's attitude toward the Union is "irrelevant," fails to accord with the statutory language of Sections 8(a) (1) and (3) and results in leaving an Employer who is unwilling or unable to defend against or counter Union coercive tactics at the total and perpetual mercy of such tactics. It is more than a denial of self defense. It is a denial of the ability to opt to escape rather than fight such tactics.

The record clearly discloses no hostility of the Employer or interference by the Employer with the rights of the employees to self organization, to join labor organizations and engage in concerted activities,[8] nor

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[6] See, e.g., *NLRB* v. *Neiderman*, 334 F. 2d 601 (2nd Cir. 1965); *NLRB* v. *Atkins Transfer Co.*, 226 F. 2d 324 (6th Cir. 1955); *NLRB* v. *R. C. Mahon*, 269 F. 2d 44 (6th Cir. 1959); *NLRB* v. *Lassing*, 284 F. 2d 781 (6th Cir. 1960), cert. den., 366 U.S. 909; *NLRB* v. *Houston Chronicle Pub. Co.*, 211 F. 2d 848 (5th Cir. 1955); *NLRB* v. *Rapid Bindery Co.*, 293 F. 2d 170 (2nd Cir. 1961); *Mount Hope Finishing Co.* v. *NLRB*, 211 F. 2d 365 (4th Cir. 1954).

[7] Petitioners argued in the Court of Appeals that substantial evidence supported the conclusion that petitioners' closing of the New York facility and opening of the Florida facility was dictated by economic, business reasons. The Court of Appeals disagreed. Inasmuch as that issue is one of substantial evidence, petitioners have not sought certiorari on the point.

[8] Thus the record shows not only voluntary recognition of the Union by the Employer, but also the negotiation and execution of a contract and an amendment thereto.

does it show any discrimination practiced by the Employer against employees in order to discourage their adherence to the Union. These are the statutory criteria. The only "hostility" shown is to the succession of "strong arm" tactics engaged in by this Union throughout the two years that it had contract relations with this Employer. These tactics included:

1. Forcing, at the threat of picketing, the Employer to recognize and enter into a contract with a union that represented none of the Employer's employees. (J.A. 134).

2. Quickie strikes called by the Union to force employees to join the Union, resulting in several employees quitting (J.A. 135-136, 143).

3. Seeking to force the Employer to cease business relationships with a contractor until the Employer joined an employer association, whose entrance fee was $1,000.00, and offering to expedite the Employer's application to join the association if the Employer would pay $250.00 to the Union (J.A. 136-139).

4. Arbitrary harassment of the Employer in the administration of the contract (J.A. 146).

5. Threats to dump Winkelman into the river and to bury him (J.A. 176, 178).

Referring euphemistically to this course of conduct as "constant friction between the Union and the Company, including apparently illegal Union demands", the Court of Appeals denied that these Union tactics were a valid reason for moving the operation to Miami with the curiously naive and irrelevant assertion that

the Company could, but did not, avail itself of the "contract's arbitration provisions." Extortion and threats of bodily injury are obviously not arbitrable. To invoke the unspecified "other procedures" the Court of Appeals stated were available to rectify the Employer's grievances would be costly, time-consuming, and—most important—would bring the full weight of this large powerful and affluent Union to bear on this small Employer in the highly organized New York city area. Thus, the "other procedures" are more apparent than real. But even if other procedures were available, there is no reason why the most fundamental "procedure" of escape should be denied an intended victim of the threatening and coercive tactics described above. Requiring a small Employer to remain and fight such tactics through "other procedures" is an affront to the basic law of self defense. It gives a charter to Unions to engage in this type of conduct without fear that the employer may choose to escape and move to a community where Unions do not engage or are not permitted to engage in these tactics. Knowledge by a Union that its threatening and coercive tactics could lead to a lawful removal of the plant by the Employer would help to achieve a respect for law. On the contrary, knowledge that one's victim's feet are tied, whatever the tactics used may be, constitutes a positive inducement and encouragement of such tactics.

CONCLUSION

For the above stated reasons petitioners respectfully request this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the decision herein.

Respectfully submitted,

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